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No. 82-1047

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner

v.

ONE ASSORTMENT OF 89 FIREARMS,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

STATUTES INVOLVED

18 USC § 922. Unlawful Acts

(a) It shall be unlawful—

(1) For any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce;

18 USC § 923. Licensing

(a) No person shall engage in business as a firearms or ammunition importer, manufacturer, or dealer until he has filed an application with, and received a license to do so from, the Secretary.

18 USC § 924. Penalties

(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

(d) Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

STATEMENT OF THE CASE

Patrick M. Mulcahey, at his home in Columbia, South Carolina, sold, to undercover agents of the Bureau of Alcohol, Tobacco and Firearms (BATF), a Ruger .357 Magnum pistol on May 13, 1976, a Taurus .38 caliber pistol on May 19, 1976, and a Smith and Wesson 9mm automatic on May 26, 1976. During 1976, Mulcahey purchased a Smith and Wesson .357 revolver, a Smith and Wesson .38 caliber revolver, and a total of seven (7) Ruger .223 caliber rifles. On December 31, 1976, Mulcahey purchased a Smith and Wesson 9mm pistol (Pet. App. 33A-35A).

On January 20, 1977, Special Agents of the BATF executed a search warrant on Mulcahey's residence and seized one hundred and five (105) firearms. (Pet. App. 36A).

Mulcahey was indicted and tried for a single violation of 18 USC § 922(a)(1) and § 924(a). Mulcahey was acquitted following the criminal trial (*United States v. Mulcahey*, 77-0013, March 16, 1977) (Pet. App. 2A).

The forfeiture action against the firearms seized from Mulcahey was initiated by the Government on March 31, 1977 by service of a complaint seeking forfeiture pursuant to 18 USC § 922(a)(1) and § 924(d). (Pet. App. 2A).[1] Mulcahey filed a claim for recovery of the firearms and an Answer to the Complaint, raising as defenses collateral estoppel and *res judicata* based upon the verdict of acquittal in the previous criminal trial. The forfeiture action was submitted to the District Court upon a stipulation that the transcript of the criminal trial would be considered by the Court in lieu of testimony (Pet. App. 2A). The stipulation was entered into because Mulcahey and the Government agreed that the facts in the criminal trial were the same facts as those which would have been elicited at a subsequent civil forfeiture proceeding. The District Court ordered a forfeiture of eighty (80) of the firearms, an order which a panel of the Fourth Circuit reversed, relying on *Coffey v. United States*, 116 U.S. 436 (1886). The Government was granted a rehearing *en banc*, after which the Fourth Circuit affirmed the panel decision in favor of Mulcahey (Pet. App. 2A-3A).

Judge Chapman, writing for the majority in the Fourth Circuit, held that in the criminal proceeding against Mulcahey, the elements of the forfeiture were all resolved against the Government, and that therefore the forfeiture action was barred by collateral estoppel (Pet. App. 6A). The majority opinion stated that

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[1] § 923(a), a provision of the licensing section of the Gun Control Act, was also given as the basis for the forfeiture. It was, however, unnecessary to include this section since the unlawful act in which the firearms allegedly were intended to be used was found in § 922(a)(1).

> [f]irearms are not contraband and are not subject to seizure unless they are used or intended to be used in violation of the Gun Control Act. This issue of whether the firearms were used or intended to be used in violation of the act was tried in No. 77-00013 and conclusively decided. The government now wishes to re-litigate the same issue, hoping for a different result

The majority opinion further stated:

> To support a conviction under 18 USC § 922(a), the government must prove two essential elements: First, that the defendant, between the dates specified in the indictment, engaged in the business of dealing in firearms (or ammunition); and second, that at the time he engaged in that business he was not a licensed importer, licensed manufacturer, or licensed dealer in firearms. 2 Devitt and Blackmar, *Federal Jury Practice and Instruction*, § 59.10. The same two essential elements must be proved in the forfeiture action. The United States had its day in court on these identical issues in the criminal case and is collaterally estopped by the verdict in that case from pursuing the matter in this forfeiture action. (Pet. App. 7A).

Finally, the majority opinion in the Fourth Circuit noted that:

> The forfeiture provision set forth in § 924(d) is a part of the "Penalties" section of the law. Everything in § 924 provides a penalty, be it a fine, prison or forfeiture, for the violation of a provision of the Gun Control Act. The forfeiture provision is merely a way of disposing of firearms which have been used in violation of the Act, after there is a conviction of such violation. Forfeiture is a penalty suffered by a defendant in addition to a fine and/or imprisonment. If Mulcahey had been convicted, he could have been fined and/or imprisoned and could have lost all of his firearms under § 924(d). But he was acquitted on the charge of being a gun dealer without a license. However, the government still wishes to

invoke the penalty of § 924(d). Mulcahey would thereby be subject to the same penalty of losing his property for an activity for which he had been found not guilty. (Pet. App. 9A-10A).

The factual allegations, charging the offense of "dealing in firearms without a license", are identical in the criminal indictment and the Complaint for Forfeiture. The Government lost in the criminal trial, and now seeks to assert a penalty against Mulcahey under 18 USC § 924(d).

SUMMARY OF ARGUMENT

In *Coffey v. United States*, 116 U.S. 436 (1886), this Court held that where a criminal proceeding which resulted in an acquittal is followed by a civil forfeiture action based upon the same facts as the criminal proceeding and in which the elements to be proven are identical to those required to be proven in the criminal proceeding, the civil forfeiture action is precluded. In subsequent cases, some involving civil actions subsequent to convictions, some involving civil actions in which the elements were different than those in the prior criminal proceeding, and some involving civil actions for monetary sanctions or damages subsequent to acquittals, this Court has never overruled or limited the narrow preclusion doctrine of *Coffey*. Thus, *Coffey*, to the extent it applies to situations on all fours with *Coffey*, remains good law and precludes the forfeiture action in the instant case.

If this Court should conclude that *Coffey* has been overruled and that civil forfeiture actions subsequent to acquittals are barred only if the forfeiture at issue is shown to be punitive, it is plain that the forfeiture in the instant case is barred since § 924(d) was intended to be, and is, punitive. This conclusion is drawn from the fact that § 924(d) is in the "Penalties" section of the Gun Control Act and additionally, by applying to the forfeiture in the instant case, the seven factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

ARGUMENT

I. THE DECISION IN *COFFEY V. UNITED STATES* IS STILL GOOD LAW AND COMPELS PRECLUSION OF A CIVIL FORFEITURE ACTION FOLLOWING A CRIMINAL ACQUITTAL, WHERE THE CIVIL FORFEITURE ACTION IS BASED UPON THE SAME ACTS AND REQUIRES PROOF OF THE SAME ELEMENTS AS THE CRIMINAL PROCEEDING.

As the Government correctly observes, the decision of the *en banc* court below rests squarely upon a single aged precedent—*Coffey v. United States*, 116 U.S. 436 (1886), a case virtually identical to the case at bar. Careful analysis of this Court's decisions since *Coffey* reveals, however, that while *Coffey* may be aged, the preclusion doctrine established therein has not lost its vitality. Indeed, this Court's decisions of the last 97 years consistently demonstrate that the fairly narrow preclusion doctrine announced in *Coffey*, while it has been distinguished, has never been questioned.[2]

The heart of this Court's holding in *Coffey* is found in the statement that

> where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against

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[2] In its attempt to demonstrate that the doctrine announced in *Coffey* has been whittled away to the degree that it is virtually nonexistent, the Government takes the position that *Coffey* announced a "broad preclusion doctrine". In fact, the doctrine announced in *Coffey* was fairly narrow and it is upon that narrow doctrine that Respondent relies.

> him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. 116 U.S. at 443.

The essence of this holding is that where a criminal proceeding which resulted in an *acquittal* is followed by a civil forfeiture action which is based upon the same facts as the criminal proceeding *and* in which the elements to be proven are identical to those required to be proven in the criminal proceeding, the civil forfeiture action is precluded.

Unfortunately, this Court did not explicate the legal foundation for its decision in *Coffey* in that it did not expressly state that the forfeiture action was barred by either *res judicata*, collateral estoppel, or Double Jeopardy. A close reading of *Coffey* reveals, however, that the decision was based upon notions of collateral estoppel,[8] not

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[8] It is important to distinguish collateral estoppel and *res judicata*. As this Court has observed, "under the doctrine of *res judicata* a judgment entered in an action conclusively settles *that action* as to all matters that were or might have been litigated or adjudged therein. But a prior judgment between the parties has been held to operate as an estoppel in a suit *on a cause of action different from that forming the basis for the original suit* 'only as to these matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'" (emphasis added) *Partman Corp. v. Paramount Corp.*, 347 U.S. 89, 90-91 (1954). In forfeiture actions against property allegedly used in connection with a criminal violation, while the defendant may formally be the property, the real party in interest is the claimant, a fact acknowledged in *Coffey* (116 U.S. at 444) and implicitly recognized by this Court in subsequent cases. See, e.g. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (Exclusionary Rule, arising from Fourth Amendment right of "the people" to be secure against unreasonable searches and seizures, applied to civil forfeiture) and *United States v. U.S. Coin and Currency*, 401 U.S. 715 (1971) (Fifth Amendment right of "any person" not to be compelled to incriminate himself applied to civil forfeiture). Thus, the parties in a civil forfeiture action are the same as the parties in a criminal proceeding.

upon Double Jeopardy or *res judicata*, since this Court empasized that "the facts which were the basis" of the criminal proceeding "did not exist" and therefore "cannot be again litigated". 116 U.S. at 444.[4] It is for this reason that subsequent decisions of this Court have not impaired the vitality of the preclusion doctrine of *Coffey*.

To better understand this Court's decision in *Coffey*, it is useful to understand what *Coffey* does not hold. In the first place, the rationale of *Coffey* would not preclude any type of civil action, including a forfeiture, brought subsequent to a criminal proceeding which had resulted in a *conviction* since, in that instance, "the facts which were the basis" of the criminal proceeding *would* have been found to exist.[5] In addition, *Coffey* would not preclude any type of subsequent civil action where the criminal offense included an element or elements which did not have to be proven in the civil action since plainly "the facts which were the basis" of the crimianl proceeding would have been different than those which were the basis of the civil proceeding. Thus, only a narrow class of subsequent civil actions are barred by *Coffey*.

Coffey, of course, involved a forfeiture action against items of property which were connected to a criminal

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[4] Further evidence that this Court's decision in *Coffey* was predicated upon collateral estoppel is the citation of *Gelston v. Hoyt*, 3 Wheat. (16 U.S.) 246 (1818), in which it was held that a verdict against the United States in a prior forfeiture action eliminated the defense of justification in a suit in trespass by the owner of the seized property against the persons who seized it.

[5] Thus, as the court below held, *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (civil action for restitution subsequent to conviction) and *Rex Trailer Co. v. United States*, 350 U.S. 148 (1955) (civil action for damages subsequent to conviction) are inapplicable to this case. In addition, *Coffey* would not bar criminal forfeitures brought pursuant to the Organized Crime Control Act, 18 USC § 1963, or the Comprehensive Drug Prevention and Control Act, 21 USC § 848(a)(2).

offense allegedly committed by the claimant. It is to that type of civil action that this Court has, to date, limited *Coffey* and to which it should continue to limit *Coffey*. Thus, *Coffey* cannot, and should not, be read as the Government suggests, i.e. "as precluding only the imposition of criminal punishments following a criminal acquittal" (Br. for U.S. 13), particularly since the plain language of the decision does not suggest such a reading nor do subsequent decisions of this Court.[6]

This Court's first opportunity to review its decision in *Coffey* was in *Stone v. United States*, 167 U.S. 178 (1897), where, following an acquittal of Stone on charges of unlawfully, willfully, and feloniously cutting and removing timber from lands of the United States, the Government instituted a civil action against him to recover the value of the timber allegedly removed and converted. Holding that the subsequent civil action was not barred by *Coffey*, this Court explained that "there was [in *Coffey*] no claim of the United States to property" (167 U.S. at 186) as there was in *Stone* and that the civil action in *Stone*, as had been the case in *Coffey*, was not a suit to declare a forfeiture. Instead, the issue in *Stone* was wholly as to the ownership of property . . . [the Government seeking in its capacity *as owner or property, illegally converted*, to recover its value." (emphasis added) 167 U.S. at 188. Moreover, the civil action in *Stone*, unlike the previous criminal action, clearly could

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[6] Indeed, if *Coffey* is read as the Government suggests, it would appear that there is no distinction between it and the line of cases cited in *Ashe v. Swenson*, 397 U.S. 436, 443-445 (1970) which hold that the Double Jeopardy Clause of the Fifth Amendment bars reprosecution of a person if, in a prior criminal proceeding, he had been acquitted of committing the same act. Yet, as *Ashe v. Swenson* clearly established a new interpretation of the law regarding collateral estoppel, it is apparent that it is not merely restating *Coffey*. Thus, *Coffey* must stand for a different principle than the Government suggests.

be maintained without a showing that the defendant had willfully or feloniously obtained the property, thereby further distinguishing *Stone* from *Coffey*. As with *Stone*, *Murphy v. United States*, 272 U.S. 630 (1926) (injunction to abate nuisance may be maintained subsequent to acquittal as injunction not based upon commission of crime); *United States ex rel Marcus v. Hess*, 317 U.S. 537 (1943) (civil action for restitution subsequent to conviction); and *Rex Trailer Co., Inc. v. United States*, 350 U.S. 148 (1955) (civil action for damages subsequent to conviction) are each easily distinguishable from *Coffey*.

The decision of this Court upon which the Government places greatest reliance to support its argument that the doctrine announced in *Coffey* has been abrogated is *Helvring v. Mitchell*, 303 U.S. 391 (1938). Unlike *Coffey*, however, *Helvring* involved the imposition of an additional tax for failure to pay income taxes (not a forfeiture of property allegedly connected to a criminal offense) following acquittal of the taxpayer on charges of fraudulently and willfully evading the income tax. For these reasons, *Helvring* is plainly distinguishable from *Coffey*.

In concluding that the additional tax, which was "provided primarily as a safeguard for protection of the revenue and to reimburse the Government for the heavy expense of investigation and loss resulting from the taxpayer's fraud" (303 U.S. at 401), was not barred, this Court considered three arguments advanced by the defendant: *res judicata*, the Double Jeopardy Clause, and *Coffey*.[7] While it rejected all three arguments, it did not

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[7] To justify its conclusion that this Court "quickly dispatched" the "collateral estoppel argument", the Government states that *res judicata* was "apparently used in a broad sense as including collateral estoppel, see 303 U.S. at 397". Br. for U.S. 14. This interpretation of *Helvring* is, however, without foundation in that this

in doing so "simply reverse[] the position taken in *Coffey*". Br. for U.S. 14. Rather, this Court correctly concluded that because *Helvring* imposed "a civil administrative sanction" (303 U.S. at 406), not a forfeiture, *Coffey* was not "an obstacle to the recovery" of the additional tax. Indeed, rather than disapprove *Coffey*, as expressly requested by the Government (303 U.S. at 405), this Court distinguished *Coffey* on the grounds that *Helvring* involved a "civil administrative sanction", not a penalty and most certainly not a forfeiture.[8] With respect to the *res judicata* argument, this Court also correctly held that because there is a "difference in the de-

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Court also refers to the doctrine of *res judicata* as the doctrine of "estoppel by judgment" (303 U.S. at 397), a doctrine clearly distinguishable from "estoppel by verdict" or collateral estoppel. See 50 C.J.S. § 593(b).

[8] This Court also did not conclude, as the Government states, that "'[f]orfeiture of goods or their value or (sic) the payment of fixed or variable sums of money' *are* civil sanctions *because* they have historically been 'enforcible by civil proceedings'". (emphasis added) Br. for U.S. 15-16. Rather, this Court only concluded that forfeitures and civil penalties are enforcible by civil proceedings without expressing any view as to whether such sanctions are civil or criminal. Nonetheless, this Court has held some of the protections afforded by the Bill of Rights are applied in civil forfeiture actions. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (Fourth Amendment exclusionary rule) and *United States v. U.S. Coin and Currency*, 401 U.S. 715 (1971) (Fifth Amendment guarantee against compulsory self-incrimination). Cf. *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931) (Double Jeopardy Clause does not apply to forfeiture) and *United States v. Zucker*, 161 U.S. 475 (1896) (Sixth Amendment right to confront witnesses does not apply in forfeiture action). The apparent disparity in these cases can be reconciled if it is observed that the Fourth Amendment imposes restrictions on government activity without regard to the type of action in which seized property will be used and that the Self-Incrimination Clause applies to "any criminal case", but that the Double Jeopardy Clause only prohibits double jeopardy where the person is in jeopardy of "life or limb" and the Sixth Amendment only applies to "criminal prosecutions".

gree of the burden of proof in criminal and civil cases . . . application of the doctrine of *res judicata* . . ." was precluded. 303 U.S. at 391.

The Court's most recent pronouncement in the area of forfeitures is its decision in *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 234 (1972), which involved the forfeiture of property not declared to customs authorities subsequent to an acquittal on charges of "willfully and knowingly, with intent to defraud the United States, smuggling [one lot of emerald cut stones and one ring] into the United States without submitting to the required customs procedure." 409 U.S. at 232-233.[9] This Court went to great lengths to make clear that the forfeiture *did not result*, as had been the case in *Coffey* and is the situation in the instant case, "by reason of the commission of a criminal offense." 409 U.S. at 236, n.6 In a prior footnote, this Court also distinguished *Coffey* (notably, without indicating that Coffey was, in any way, disapproved) when it noted the "difference in the issues involved in the criminal proceeding, on the one hand, and the forfeiture action on the other" (409 U.S. at 232, n.5), i.e. the added element of intent that had to be shown in the criminal proceeding. Most importantly,

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[9] This Court's decision in *United States v. $8,850*, No. 81-1062, (May 23, 1983) is plainly irrelevant to the issue in the instant case since the issue therein was "whether the Government's 18-month delay in filing a civil proceeding for forfeiture . . . violates the claimant's right to due process of law." Slip op. 1. Moreover, since the elements of the misdemeanor offense of which the claimant was acquitted were different (an element of willfullness was included in the misdemeanor offense) than the elements of the civil forfeiture action, the claimant could not have raised *Coffey* as a bar to the civil forfeiture action. Likewise, this Court's decision in *United States v. Ward*, 448 U.S. 242 (1980) does not limit the holding in *Coffey* since *Ward* clearly concerned not a forfeiture but rather a monetary civil penalty in the nature of damages. More to the point, the civil action in *Ward* was not instituted subsequent to an acquittal in a criminal proceeding; thus, neither *res judicata*, collateral estoppel, nor Double Jeopardy were at issue in *Ward*.

however, this Court expressly upheld *Coffey* by commencing its opinion in *One Lot* with the statement that "[c]ollateral estoppel *would bar* a forfeiture under §1497 [which was not the basis of the prior criminal proceeding] *if, in the earlier criminal proceeding, the elements of a § 1497 forfeiture had been resolved against the Government.*" (emphasis added) 409 U.S. at 234. In so doing, this Court made plain, as it had in *Coffey* nearly a century earlier,[10] that the differing standards of proof, while they might preclude application of the doctrine of *res judicata*, could not be used to preclude application of the doctrine of collateral estoppel. Thus, this Court's most recent review of *Coffey* makes clear that *Coffey*, to the degree it is limited to civil forfeiture actions subsequent to criminal acquittals where the facts and issues in both proceedings are identical, remains good law. As a consequence, the civil forfeiture action in the instant case should, under the *Coffey* doctrine, have been precluded.

II. FORFEITURE UNDER 18 U.S.C. 924(d) IS PUNITIVE.

Should this Court decide to overrule the well-established narrow preclusion doctrine of *Coffey* which, just a decade ago, it approved, and determine, as did the original dissent in the court below, that preclusion is demanded only where a subsequent forfeiture proceeding is deemed to be criminal in nature, this Court should then conclude, as did the majority in the court below, that 18 U.S.C. 924 (d) is punitive in nature.[11] As a consequence, the for-

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[10] "It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule of requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States . . ." 116 U.S. at 443.

[11] The original dissent in the court below concluded that *Coffey* bars only a "subsequent criminal forfeiture . . . arising out of the

feiture action is barred by the Double Jeopardy Clause of the Fifth Amendment.

Over the years, this Court has had to determine whether certain civil sanctions were sufficiently punitive in nature to require application of the guarantees of the Bill of Rights (see cases cited in fn. 7) to certain civil actions and has found the problem to be extremely difficult and elusive of solution. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168. As to forfeitures, however, this Court has held that "they are within the reason of criminal proceedings for all purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself . . . ." *Boyd v. United States*, 116 U.S. 616, 634 (1886). Subsequent cases, such as *United States v. Regan*, 232 U.S. 37 (1914) (Government need not prove case beyond reasonable doubt in action for $1,000 penalty) and *United States v. Ward*, 448 U.S. 242 (1980), have made clear that the rule of *Boyd* applies primarily to forfeitures, not to monetary penalties. Cf. *Lees v. United States*, 150 U.S. 476 (1893). Indeed, as to forfeitures, this Court has not hesitated to apply the guarantees of the Bill of Rights when the forfeiture is "part of the punishment for the criminal offense." *Various Items of Personal Property v. United States*, 282 U.S. 568, 581 (1931). Thus, it must be determined whether § 924(d) is "part of the punishment for the criminal offense."

In the absence of conclusive evidence of congressional intent (which is, nonetheless, plain in the instant case,

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same facts" as an earlier criminal acquittal (Pet. App. 23a). Since, however, none of this Court's decisions have used the term "criminal forfeiture" in the context of a forfeiture action subsequent to a criminal acquittal, it appears that the original dissent, and the Government, have confused forfeitures following acquittals with forfeitures following convictions such as those required by 18 USC § 1963 and 18 USC § 848(a)(2).

given that § 924(d) is included in the "Penalties" provision of the statute), this Court has set forth the factors to be considered in construing particular statutes. *Kennedy*, 372 at 169.[12] The application of the factors to this case clearly points to the punitive nature of the sanction in 18 U.S.C. 924(d), thereby requiring that the Fifth Amendment guarantee against Double Jeopardy be applied in the instant case to preclude the subsequent civil forfeiture action.[13]

The first factor, an "affirmative disability or restraint", has previously been recognized in cases dealing with old age benefits,[14] an ex-post facto enactment,[15] and a pro-

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[12] Those relevant factors, which this Court notes may often point in different directions, include (372 U.S. at 168-169; footnotes omitted):

> Whether the sanctions involve an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

[13] In *Various Items of Personal Property v. United States*, 282 U.S. 568 (1931), this Court held that a forfeiture of a distillery, warehouse, and denaturing plant connected with a violation of the Revenue Act of 1918 subsequent to a conviction was not barred by the Double Jeopardy Clause since "[t]he forfeiture is no part of the punishment for the criminal offense." 282 U.S. at 581. Thus, if a forfeiture can be shown to be a "part of the punishment for the criminal offense", the Double Jeopardy Clause would apply and a subsequent forfeiture action would be barred.

[14] *Fleming v. Nestor*, 363 U.S. 603 (1960) (statutory termination of social security benefits not punitive and not a deprivation of accrued property rights).

[15] *Ex parte Garland*, 4 Wall (71 U.S.) 333 (1967) (oath required of attorneys seeking to practice before the federal courts was a punishment that violated the constitutional rule against *ex post facto* laws.)

hibited bill of attainder.[16] The term, "affirmative disability or restraint" may, however, be construed in a broader manner than this Court has to date done. A forfeiture, and in the case at bar particularly, plainly imposes a hardship on the owner of the *res*. He is affirmatively disabled and restrained from the actual possession, ownership, and enjoyment of the property forfeited and undeniably restrained in choosing whether to keep or dispose of the property as he sees fit, whatever its value may be.[17] This freedom to own, enjoy, and dispose of personal property acquired in exchange for hard-earned wages is certainly no less valuable to an individual than is the right to avoid the consequences of an ex-post facto law or the right to payment of earned salary.

Further, the forfeiture of Patrick Mulcahey's firearms affirmatively disables him in that it stigmatizes him and sullies his reputation. His prior acquittal, on the criminal charge of engaging in the business of dealing in firearms without a license, conclusively cleared him in the eyes of his peers of any criminal wrongdoing. Yet, if the Government successfully forfeits his firearms, it will have effectively established his guilt in the eyes of his peers. Such a tactic has the practical effect of restricting the personal liberty of an individual to have and enjoy a reputation free of any and all innuendos of guilt.

In consideration of the second factor, whether forfeiture has historically been regarded as punishment, it is not necessary to go any further than this Court's decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416

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[16] *United States v. Lovett*, 328 U.S. 303 (1945) (statute denying payment of earned salary to three named government employees as punishment for past behavior amounted to unconstitutional bill of attainder).

[17] Unlike the distillery equipment in *Various Items, supra*, which can only be used to produce alcohol subject to tax, firearms can be used for purposes other than those which give rise to violations of the Gun Control Act.

U.S. 663 (1974) to understand the history of forfeitures in the United States. In that decision, which concerned a Puerto Rican statute which provided for forfeiture of vessels used for unlawful purposes, this Court noted, after reviewing the history of forfeiture law,[18] that statutes which authorize the forfeiture of property used in connection with a crime further "punitive and deterrent purposes" and "foster[] the purposes served by the underlying criminal statutes, both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." 416 U.S. at 686-687. Forfeitures pursuant to § 924(d) likewise foster the purpose of the Gun Control Act and so must be considered punitive.[19]

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[18] The Government suggests that because "Congress was certainly aware of this history when it enacted 18 U.S.C. 924(d)" (Br. for U.S. 20) that it intended forfeiture pursuant to § 924(d) to be a civil remedial sanction and therefore not barred by a prior criminal acquittal. It is far more likely, however, that in enacting § 924(d) Congress had in mind the decision in *Coffey*, not English history prior to the adoption of the Constitution, and that, therefore, the preclusion doctrine of *Coffey* was meant to be applied to § 924(d).

[19] Throughout its brief, the Government contends that the purpose of § 924(d), in the context of the Gun Control Act itself (as distinguished from "any other criminal law of the United States"), is "to remove from circulation firearms that have been either illegally obtained and distributed or set apart for such use" or to eliminate "stocks of firearms that have been used or intended for use (sic) outside regulated channels of commerce." Br. for U.S. 25-26. In fact, the purpose of § 924(d) in the context of the Gun Control Act itself is somewhat different than propounded by the Government—it is to remove from the hands of individuals who have used or may use certain firearms in violation of the Gun Control Act so that those firearms will not, as a consequence of the acts of such individuals, "be obtained by individuals whose possession of them would be contrary to the public interest." *Huddleston v. United States*, 415 U.S. 814, 825 (1974). Thus, the law is not aimed at eliminating firearms *per se* but rather at removing them from individuals who have or will use them in violation of the Gun Control Act.

With regard to the third factor, while § 924(d) does not require a showing of *scienter*, thereby suggesting, at first blush, that it is not a criminal sanction, this fact does not diminish the punitive nature of the forfeiture sanction of § 924(d) given the fact that to be convicted of violating the Gun Control Act no proof of *scienter* is required. Thus, the elements of proof are identical, indicating that the sanctions should also be considered equivalent.

The operation of a forfeiture of Patrick Mulcahey's firearms would, without question, promote the traditional aims of punishment, retribution, and deterrence, the fourth factor to be considered in determining the punitive nature of a civil sanction. As was made clear with respect to the second factor, this Court has accepted the view that forfeitures which involve property that has been used in connection with a criminal offense "further the punitive and deterrent purposes" (*Calero-Toledo, supra*, at 686) of the criminal law.

The fifth factor used in determining whether a sanction is punitive in nature, a factor which has no more or less significance than any other factor, contrary to the statement of the Government (Br. for U.S. 34), is a consideration of whether the behavior to which it applies is already a crime. In every action under 18 U.S.C. 924(d), the language expressly requires that the forfeited firearms must have been involved in, used or intended to be used in violation of the Gun Control Act or any other criminal law of the United States. Clearly, therefore, this factor is fulfilled in the instant case.

In considering the sixth factor, whether an alternative purpose to which the sanction may rationally be connected is assignable for the sanction, one needs first to examine the Congressional Findings and Declaration of Purpose in the Gun Control Act.[20] Clearly Congress did not in-

[20] Section 101 of Pub. L. 90-618 provides that: "The Congress hereby declares that the purpose of this title is to provide support

tend to deprive law-abiding citizens of the possession, use, and enjoyment of firearms. Thus, as none of the firearms sought to be forfeited here are illegal firearms *per se*, there is, at the very least, a strongly punitive aspect to their forfeiture. Moreover, while there may be some "alternative purpose" for taking legal firearms out of the stream of commerce—as a means of diminishing the possibility that they will fall into the hands of those persons to whom firearms are prohibited—the prime purpose of § 924(d) is to remove firearms from the hands of persons who have or may use them in connection with a criminal offense. Thus, the real effect of § 924(d) is punishment of the person from whom the firearms are seized.

The final factor, whether the sanction appears excessive in relation to the alternative purpose assigned, is satisfied beyond doubt by examining the relationship between the value of the firearms sought to be forfeited in the instant case and the maximum punishment imposed by 18 U.S.C. 924(a). The Complaint for Forfeiture of the firearms alleges that the value of the seized guns was $5,507.00 (Joint App. 7). Patrick Mulcahey, in his answer, challenged that figure and alleged the true value to be in excess of $15,000.00. In either event, the totals reflect amounts in excess of the maximum fine of $5,000.00 which could be imposed on Mulcahey under 18 U.S.C. 924(a) had he been convicted of the one charge in the indictment.

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to Federal, State, and local law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title."

These factors, as noted above, are intended to be examined *only* "in the absence of conclusive evidence of congressional intent" as to the punitive nature of the sanction. Here, however, there exists "conclusive evidence" that Congress intended forfeitures under 18 U.S.C. 924(d) to be punitive: the designation of 18 U.S.C. 924 as the "Penalties" provision. Had Congress intended forfeiture under 18 U.S.C. 924(d) to be remedial, rather than punitive, it could easily have included the forfeiture provision under a separate and distinct section of the Gun Control Act. As it did not, it is apparent that every sanction under 18 U.S.C. 924 provides for a penalty whether it is a fine, imprisonment, or forfeiture. Moreover, the fact that Congress did not separate the sanctions of imprisonment, fine, and forfeiture and enacted them simultaneously, a matter this Court has found to be "quite significant" (*Ward, supra*, at 250), indicates that Congress clearly intended that a forfeiture be viewed as punitive. Thus, forfeiture pursuant to § 924(d) is punitive and, because of the Double Jeopardy Clause of the Fifth Amendment, precludes the forfeiture of Mulcahey's firearms.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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